United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original w/ affidavit of mailing

74-2656

To be argued by
STEVEN KIMELMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2656

UNITED STATES OF AMERICA,

Appellee,

—against—

SALVATORE POLISI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Preliminary Statement

Salvatore Polisi appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Neaher, *J.*). Appellant was convicted, after a jury trial, of two counts of armed bank robbery in violation of Title 18, United States Code, Section 2113(a) and Section 2113(d) respectively.* On May 31, 1974, the District Court ordered appellant committed for study and report pursuant to Title 18, United States Code, Section 4208(b). On December 13, 1974, following the court's receipt of the Section 4208(b) report, appellant was resentenced to eight years imprisonment, which he is currently serving.

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* Appellant's co-defendant, Edward Pravato, was also convicted. That conviction was affirmed in *United States* v. *Pravato*, 505 F.2d 703 (2d Cir. 1974).

On this appeal, in which appellant is represented by the firm of LaRossa, Shargel and Fischetti,* appellant's sole contention is that despite appellant's newly founded claims of mental incompetence, the trial court improperly resentenced appellant rather than ordering an examination or evidentiary hearing pursuant to Title 18, United States Code, Section 4244. No contentions are made with respect to the sufficiency of the evidence of guilt nor does appellant contend that any errors occurred during the trial.

Statement of the Case

A. Pre-Trial Proceedings

Appellant was arrested on March 25, 1972 by agents of the Federal Bureau of Investigation. On April 20, 1972, represented by Mr. Coiro, he pled not guilty to the indictment. On June 12, 1972, appellant's co-defendant Pravato requested psychiatric examination pursuant to Title 18, United States Code, Section 4244. Judge Neaher granted this motion and Pravato was subsequently found to be competent to stand trial. Because Pravato became seriously ill, the trial was adjourned on several occasions until March 1974. No similar request for a Section 4244 examination was ever made by appellant during the two year period following his arrest.

B. The Trial

Following two days of suppression hearings, and three days of a jury trial, appellant and Pravato were convicted of the May 3, 1971 armed robbery of approximately $25,000

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* At all times prior to, during, and for several months after the trial, appellant was represented by Michael Coiro, Esq. Gerald Shargel Esq. of the LaRossa firm appeared for the appellant as early as July 9, 1974, (almost five months prior to the date of sentencing) and at the time of the December 13, 1974 sentencing.

from the Franklin National Bank at 249-46 Horace Harding Boulevard, Queens, New York. During the trial appellant was identified by two tellers (294, 387)* as the individual who vaulted the teller's counter at the bank and robbed them at gun point of the cash in their drawers (288-290, 294, 383, 387). Pravato was identified by three eye-witnesses as the second robber. The third individual was never apprehended.

Appellant rested without presenting any witnesses on his behalf. He did testify, however, outside of the presence of the jury, that he had not attempted to distort his features for the post arrest photographs taken by the F.B.I. (519).

The record of both the suppression hearings and the trial is completely devoid of any indication by appellant or his counsel that appellant was at any time mentally incompetent or unable to assist in his own defense. Counsel on appeal does not claim otherwise.

C. Post Trial Proceedings

On May 31, 1974, appellant appeared for sentencing before Judge Neaher. He was accompanied by Mr. Coiro's law partner, Mr. Salvatore Quagliata, Esq. (G.A. 1). Appellant's counsel spoke at great length as to the "inaccuracies" in the pre-sentence report regarding appellant's past and current criminal activities (G.A. 3-5). Counsel also indicated to the District Court that for the past 14 months, prior to May 31, 1974, appellant had been working 12-14 hours a day in his mother-in-law's grocery business (G.A. 5). Mr. Quagliata further stated:

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* Page references in parenthesis refer to minutes of the trial. References preceded by the letter "A." refer to pages in Appellant's Appendix and "G.A." refers to pages in the Government's Appendix.

> "He has made that business a very, very successful operation. He not only stays in the business and attends to the public but also buys all the supplies in the business and is there not six, but seven days a week, sir, and I am surprised, really that that is not indicated in the report" (G.A. 5-6).

Appellant's counsel then requested a one week adjournment to enable the Probation Department to "correct" its pre-sentence report. The District Court denied this request because of its intention to sentence appellant pursuant to Title 18, United States Code, Section 4208(b). The Court noted that the pre-sentence report indicated that appellant had both emotional and mental problems (G.A. 13-14). Appellant's counsel did not object to the court's decision or at that time request examination pursuant to Title 18, United States Code, Section 4244 rather than the Section 4208(b) examination.* Neither appellant nor his counsel indicated to the Court at this time that appellant presently had or ever had any difficulty in either understanding the proceedings against him or assisting in his own defense. No assertion was made that appellant was then incompetent or had been so during the trial or the bank robbery.

Appellant did not surrender as ordered on June 3, 1974 to commence his sentence of study and report. Accordingly, it was necessary for the Court to issue a bench warrant resulting in appellant's arrest on July 8, 1974. Appellant thereafter was examined at the Springfield Medical Center pursuant to Title 18, United States Code, Section 4208(b). On December 13, 1974, appellant appeared for resentencing with his anticipated appellate counsel, Mr. Shargel.

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* As noted in appellant's brief, the probation report as well as the § 4208(b) report have been sealed for review by this Court.

Appellant's new counsel moved for the first time at the resentencing to set aside the verdict on the grounds that the 4208(b) report contained information which, he asserted would require a hearing to determine whether appellant was competent at the time the bank robbery was committeed or at the time of his trial (A. 16). The Court denied this motion, stating (A. 21-22):

> "Well, I going to deny the motions at this time and believing on the basis of the Probation Report, and on the basis of the classification report, as I have read them, that the defendant who has an IQ of 114 indicating above-average intelligence has certain emotional problems which have been a cause of some distress.
>
> I see nothing in these reports suggesting to the Court a basis for holding an evidentiary hearing on the state of his mentality, even at the time of the crime in question, I believe occurred in accordance with the indictment of May of 1971, or indicating his inability to stand trial which took place in March, I believe it was 1974, so I will deny those motions."

ARGUMENT

The Trial Court Did Not Abuse Its Discretion By Refusing To Either Commit Appellant Pursuant To Title 18 United States Code Section 4244 Or To Hold An Evidentiary Hearing As To Appellant's Mental Competence.

Appellant contends that his sentence should be vacated because nine months after he was found guilty, his appellate counsel concluded on the basis of the Section 4208(b) report that appellant might hav been mentally incompetent (1) at the time the offense was committed; (2) during the trial; (3) at the time of his second sentencing on December

13, 1974; or (4) all of the above. This claim is raised despite the fact that appellant's highly competent trial counsel in over two years of proceedings in this matter never once suggested that there was any basis to question appellant's competency even though appellant's trial counsel was aware of appellant's psychiatric background. Indeed, at the first sentencing, no request was ever made on appellant's behalf that the authorities at Springfield Medical Center examine appellant specifically as to his mental competance at the time the offense was committed or during his trial.

The entire record suggests that the reason this request was never made is that neither the appellant, the Court nor the Government ever had reason to believe that appellant, though mentally disturbed, was ever mentally incompetent at any stage of the proceedings against him. The Government therefore urges that appellant's belated attempt to delay his sentencing was frivolous and properly rejected by Judge Neaher.

An examination or hearing pursuant to Title 18, United States Code, Section 4244 is by no means an automatic or absolute right. Rather, motions addressed to this provision will be granted only when they set forth "reasonable grounds" to believe that a defendant is presently insane or otherwise so mentally incompetent as to be unable to understand proceedings against him or properly assist in his own defense. *United States* v. *Vowteras*, 500 F.2d 1210, 1212 (2d Cir. 1974), *cert. denied*, — U.S. — 43 U.S.L.W. — (1974); *United States ex rel. Roth* v. *Zelker*, 455 F.2d 1105, 1108 (2d Cir.), *cert. denied*, 408 U.S. 927 (1972); *United States* v. *Wilkins*, 334 F.2d 698, 703 (6th Cir. 1964). The only grounds cited in appellant's belated motion at the time of his final sentencing on December 13, 1974 were the "newly discovered" findings set forth in the pre-sentence and Section 4208(b) reports. A careful examination of these reports, however, can only result in this Court reach-

ing the same conclusion as the trial Court: that while appellant clearly has emotional and psychiatric problems, there is not even the slightest suggestion, much less a conclusion that he was ever incompetent under the applicable standard set in *Dusky* v. *United States*, 362 U.S. 402 (1960). Indeed, these reports conclusively demonstrate the opposite conclusion.*

Moreover, although appellant now claims that he might have been mentally incompetent prior to or during his trial, there was not one single affidavit presented in support of his Section 4244 motion to the trial court or as part of this appeal. Not one affidavit was forthcoming from either his well known and highly competent trial counsel, who represented appellant for well over two and one-half years in these proceedings, or from a single psychiatrist, including the doctors at the Veteran's Administration who had treated appellant for over eight years, to the effect that appellant was ever incompetent under the *Dusky* standard.** Indeed, appellant's trial counsel readily acquiesced in the Court's imposition of the Section 4208(b) sentence. Therefore, appellant's present claim that a further psychiatric examination pursuant to Section 4244 would "suddenly reveal" that appellant was and remains incompetent under *Dusky*

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* Because the reports in question have been sealed for review by this Court, no specific citations to portions of the reports are set forth herein. However, it is respectfully suggested to this Court that a review of the statements made by appellant himself to both the probation department and the medical authorities at Springfield clearly demonstrate appellant's full understanding of the proceedings past and present as well as his ability to assist in his own defense. Such "psychiatric" language as exists in these reports, we daresay, is hardly novel.

** The absence of any suggestion in this entire record by appellant's competent trial counsel that appellant in any way was unable to understand the proceedings or assist in his own defense is highly probative and significant. *United States ex rel. Roth* v. *Zelker*, *supra*, 455 F.2d at 1108. The absence of any insanity defense at the trial speaks for itself.

despite overwhelming evidence to the contrary, can only be considered frivolous. Part of this overwhelming evidence is trial counsel's own statements at appellant's first sentencing on May 31, 1974 to the effect that appellant had been a highly successful and industrious businessman during the entire period of the proceedings against him (G.A. 5-6).*

A comparison of the instant record on appeal with that of the *Vowteras* case, *supra,* substantiates the District Court's proper refusal of appellant's Section 4244 motion.

In *Vowteras,* which was a direct appeal, the reasonable grounds set forth for a post-trial Section 4244 examination were significantly stronger than in the instant appeal. Nestor Vowteras submitted affidavits from both his trial attorney and two doctors, one a neuropsychiatrist, to the effect that he was incompetent at the time of his trial (G.A. 25-39). These affidavits contained very strong language as to Vowteras' "'psychotic nature" but this Court in examining the entire record affirmed the trial court's proper exercise of discretion noting "the observations of the appellant by the trial court . . . substantially undermine any possible inference that there was a reasonable ground to invoke the procedure of 18 U.S.C. § 4244." (500 F.2d at 1212).

On this appeal, appellant fails to cite the most recent decisions of this Court: *Vowteras, supra,* and *United States ex rel. Roth* v. *Zelker, supra.* He relies, instead, on *Pate* v. *Robinson,* 383 U.S. 375 (1966); *Nathaniel* v. *Estelle,* 493 F.2d 794 (5th Cir. 1974); and *Tillery* v. *Eyman,* 492 F.2d 1056 (9th Cir. 1974), in each of which the issue of the defendants' mental incompetence was substantial and brought out at the trial. Those cases therefore, are clearly

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* The frivolity of appellant's claim is further shown by the fact that at the Dec. 13, 1974 sentencing, counsel offered to forego "any motion or appeals or anything else" (A. 17), if the court did not impose "ordinary imprisonment" of the appellant (*id.*).

distinguishable from the instant appeal. Moreover, the issue here is not one of "waiver" but rather whether Judge Neaher properly exercised his discretion in light of the grounds offered by appellant in support of his motion. Thus, the cases cited by appellant have no relation to the facts of the instant appeal or to the most recent cases of the Circuit which deal directly with the issue of what constitutes reasonable grounds for the granting of a post-trial request for a Section 4244 examination.

Appellant also relies heavily on the Fifth Circuit decision in *Van De Bogart* v. *United States*, 305 F.2d 583 (1962) as support for the position that his comprehensive examination pursuant to Section 4208 is completely unsuitable to determine his mental competency to stand trial. Appellant position is first of all undercut by decisions of both the 10th Circuit and the 4th Circuit, (on facts much closer to the instant record that *Van De Bogart*), which conclusively state that a Section 4208(b) examination may indeed be substituted for one pursuant to Section 4244. *Wolf* v. *United States*, 430 F.2d 443 (10th Cir. 1970); *United States* v. *Dillinger*, 341 F.2d 696 (4th Cir. 1965). In the above-cited cases, the Section 4208(b) examination occurred after a guilty plea (*Wolf*) and after a jury verdict of guilty (*Dillinger*). In both cases neither defendant had specifically requested Section 4244 examinations and the respective circuit courts clearly found no basis for the conclusion that a Section 4244 examination was mandated in addition to the Section 4208(b) examination.

Additionally, both the Tenth Circuit in *Wolf* and the Eighth Circuit in *Wheeler* v. *United States*, 404 F.2d 252 (1968) have held that the presence of some degree of mental disorder in a defendant does not necessarily mean that he is incompetent to either understand the proceedings against him or assist in his own defense. *Wolf, supra*, 430 F.2d at 445; *Wheeler, supra*, 404 F.2d at 254. An examination of the entire record on this appeal leaves little doubt

that the trial court, upon learning of appellant's past psychiatric treatment, took every reasonable and cautious step to determine the extent of appellant's emotional and mental problems. There is no question that the trial acknowledged that appellant had serious emotional and mental disorders (A. 21-22). The trial court, however, properly found no reasonable basis to infer that a Section 4244 examination would shed any further light on the Court's already extensive knowledge of appellant and his background (A. 22).

Finally, the facts in *Van De Bogart* are clearly distinguishable for those of the instant appeal. Van De Bogart had pleaded guilty and simultaneously requested a psychiatric examination which was granted pursuant to Section 4208(b). The Fifth Circuit held in *Van De Bogart* that to properly determine the validity of the defendant's plea a specific examination as to his competency to understand the proceedings against him and assist in his own defense was required. In the instant situation, appellant had gone through a complete trial and the trial court was never presented with any basis to believe that appellant had ever suffered any disability under the *Dusky* standard. Moreover, unlike the *Van De Bogart* court, the trial court here already had additional information as to appellant's emotional and mental background as provided in the Veterans Administration reports submitted by appellant and the presentence report prepared by the Probation Department. A review of these reports clearly demonstrate that they are completely devoid of any suggestion that appellant was ever incompetent under the *Dusky* standard.*

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* Appellant's reliance on *Oliver* v. *United States*, 398 F.2d 353, 355 (9th Cir. 1965) is similarly misplaced. That case, an affirmance, involved, as does the instant appeal, a trial counsel who had failed either to request a § 4244 examination or at any time raise a question as the defendant's mental competency to proceed.

In view of the totality of all the circumstances set forth above, the trial court did not abuse its discretion by failing to find a reasonable basis for ordering an examination or hearing pursuant to Section 4244 for this appellant.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
March 10, 1975

Respectfully submitted,

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AFFIDAVIT OF MAILING

COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Lydia Fernandez being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 12th day of March 19 75 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

LaRossa, Shargel & Fischetti, Esqs.
522 Fifth Avenue
New York, N. Y. 10036

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
12th day of March 19 75

Martha Sharf
MARTHA SHARF
Notary Public, State of New York
No. 24-0249350
Qualified in Kings County
Commission Expires March 30, 1975